

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-180010.08

DATE: MAY 4 1976

MATTER OF: Willie W. Cunningham - Arbitrator's Award of
Retroactive Promotion and Backpay

DIGEST: Federal Labor Relations Council requested decision on legality of arbitrator's award of retroactive promotion and backpay. Arbitrator found grievant was assigned higher duties but was not given temporary promotion as provided in negotiated agreement. Award may not be implemented since new position had not yet been classified and grievant cannot be promoted to a position which did not exist.

This action involves the request of December 16, 1975, by the Federal Labor Relations Council (FLRC) for an advance decision as to the legality of a retroactive promotion with backpay awarded by an arbitrator in the matter of Naval Ordnance Station, Louisville, Kentucky and Local Lodge No. 838, International Association of Machinists and Aerospace Workers (Thomson, Arbitrator), FLRC No. 75A-91. The case is before the Federal Labor Relations Council as a result of a petition for review filed by the agency alleging that the award violates applicable laws and regulations.

The grievant in this case, Ms. Willie W. Cunningham, had been employed by the Naval Ordnance Station in the position of Mail Clerk, GS-305-03, since 1970, and, since at least July 1974, she had been spending part of her time performing duties as a Bindery Helper at the specific request of her supervisor. The grievant apparently informally discussed with her supervisor the possibility of a higher job classification and higher pay, and on November 27, 1974, she formally requested a promotion to the position of Helper, Bindery Worker. This request was denied and she filed a grievance on December 19, 1974, requesting a promotion to the position of Helper, Bindery, effective September 29, 1974. The agency, on December 9, 1974, officially classified the position of Helper (Bindery), WP-4404-04, and the position description stated that 70 percent of the typical work performed in the position would involve bindery work and 30 percent would involve mail distribution. Ms. Cunningham was given a temporary promotion to this position on December 22, 1974, and was permanently promoted to the position on February 16, 1975.

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The arbitrator, on July 7, 1975, found that under the negotiated agreement the agency was required to temporarily promote an employee assigned to and performing duties of a higher graded position (under certain time conditions). He further found that the agency had to promptly establish, classify, and announce the new position to which it had already assigned the duties thereof to the grievant, and he, therefore, sustained the grievance. The award required the temporary promotion of Ms. Cunningham with higher pay during the period of September 29 through December 21, 1974, although the position had not been officially classified until December 9, 1974.

The Department of the Navy filed a timely petition with the Federal Labor Relations Council for review of the arbitrator's award. The FLRC has accepted the petition and has requested our decision as to whether the arbitrator's award of retroactive promotion and backpay violates applicable laws and regulations.

The agency contends that there was no officially graded position or vacancy in existence prior to December 9, 1974, and that, therefore, a temporary promotion could not be effected prior to that date. It argues that the provision in the negotiated agreement requiring temporary promotions (under certain conditions) is "inoperative" unless a position exists which has been classified by a classification or job grading authority. It cites several decisions of our Office regarding retroactive promotions in which the agency states the existence of a position or vacancy was implicit.

The union contends that the arbitrator found an implicit nondiscretionary obligation on the part of the agency to either classify the position "within the contractual time frame" or withdraw the higher level duties, and that without this obligation the agency could assign new duties and withhold higher compensation "for a never ending period." It also challenges the factual determination that the position Helper (Bindery) was not classified.

The exception to the arbitrator's award relating to the facts will not be ruled upon by this Office. We shall limit our consideration to the propriety of implementing the award in question based on the facts as found by the arbitrator that the position had not been classified prior to December 9, 1974.

The negotiated agreement between the union and the agency provides, in Article 15, Section 9, that temporary promotions are to be utilized in situations requiring the temporary service of an employee in a higher graded position. That section provides further that if the assignment to the higher level position is for a period of 15 days or more the employee shall be promoted not later than the second pay period from the date of the assignment. The agreement provides further, in pertinent part:

"ARTICLE 18

"Changes in Job Descriptions and Requirements

"Section 1. JOB DESCRIPTION POLICY

"The Wage and Classification Program shall be administered within the guidelines issued and authority delegated by the Civil Service Commission and higher Navy authority.

"Section 2. JOB DESCRIPTION CHANGES

"a. Job and position descriptions are written to accurately describe the major duties and responsibilities of the incumbent. These descriptions are then classified by the Civilian Personnel Department to determine rate, title, pay level, and qualifications requirements. Modifications to job descriptions are required to describe changes in work assignments and the current state of the art as technological advances are made.

"b. In any case where action is proposed to modify the position or job description of any employee in the bargaining unit for any reason, and such change may affect the rating, title, pay level, or qualification requirements for the job or position, it is agreed that the proposed changes will be discussed with the employee(s) concerned prior to the effective date of the change. Such changes will not be made to evade the merit promotion principles or any other condition negotiated in this Agreement. In any discussion pertaining to such changes, the employee(s) concerned may be accompanied by his Steward.

"Section 3. JOB DESCRIPTION REVIEWS AND APPEALS

"a. Any employee in the unit who feels that his job or position is improperly rated or classified, shall have the right to request his supervisor to have his job rating or position classification reviewed.

"c. If the supervisor and the employee cannot reach a mutual agreement, the employee may file a classification or rating appeal, or the supervisor may request a Wage and Classification Specialist from the Industrial Relations Department to conduct an audit of the employee's regular work assignment.

"e. If the employee is not satisfied with the Wage and Classification Specialist's decision, he may file a classification appeal.

"Section 4. CLASSIFICATION INEQUITIES

"a. All employees in the bargaining unit shall be freely and fully provided the opportunity to appeal what they consider to be inequities in their existing grade or rating or any proposed downgrading.* * *

The arbitrator found that the grievant was performing the work of a higher level position and could not be "denied the benefits thereof owing to the Company's (agency's) lack of diligence in classifying the position." The arbitrator stated that only by prompt classification would the promotion process of Article 15 not be impaired. However, Article 18 of the negotiated agreement does not appear to impose any time deadlines on the agency for classifying positions. In this connection, it is noted that classification of positions is basically a matter within the jurisdiction of the employing agency and the Civil Service Commission. 5 U.S.C. 5107 (1970) and 5346 (Supp. IV, 1974).

Classification of positions is within the discretion of the agency, subject to requests for review and appeals by employees. See Article 18, Section 3 of the negotiated agreement; 5 C.F.R. 511.601 et seq., and 532.701 et seq. (1975). In this connection, the arbitrator stated that only by prompt classification could the promotion process provided under the negotiated agreement not be impaired. However, as the arbitrator recognized, this case involves

promotion to a new position which had not been classified at the time the grievant began to perform the duties thereof. It does not involve assignment to an established higher grade position. The provisions of Article 15 of the agreement (concerning promotions) were not involved. Rather the case concerned the provisions of Article 18 which recognized that the matter of the job description was subject to the classification review and appeal process set forth in civil service regulations.

As noted in 55 Comp. Gen. 515 (1975), the Civil Service Commission's regulations for position classification provide that the effective date of a classification action taken by an agency or a classification action resulting from an employee's appeal is the date the action is approved or the appeal is decided or a date subsequent to that date. See C.F.R. 511.701 et seq., and 532.701 et seq. (1975). Absent any indication that the grievant's position was illegally or intentionally misclassified, there is no authority to allow a retroactive promotion with backpay on the ground that there was an erroneous classification decision. 52 Comp. Gen. 631 (1973); 50 id. 551 (1971); and B-173831, September 3, 1971. Therefore, until the position was classified upward and she was promoted, the grievant was not entitled to the pay of the higher graded position. Dianish et al. v. United States, 183 Ct. Cl. 782 (1968). In this connection we point out that the above rule concerning classification actions has recently been confirmed by the Supreme Court of the United States in United States v. Testan et al., 44 U.S.L.W. 4245, decided March 2, 1976.

Accordingly, it is our conclusion that the arbitrator's award may not be implemented.

RETT KELLER

Deputy

Comptroller General
of the United States